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IN THE

Supreme Court of the United States

Term, A.D. 1967

No. 1081

VISIDOR CORP., a corporation of the State of New Jersey,

Petitioner,

v.

BOROUGH of CLIFFSIDE PARK, a municipal corporation of the State of New Jersey,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

LOUIS EISENSTEIN,
WITTMAN, ANZALONE & BERNSTEIN,
(Frederick L. Bernstein)
Constitution Square South,
25 East Salem Street,
Hackensack, New Jersey,
Attorneys for Petitioner.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

(a) The Superior Court of New Jersey, Law Division, Bergen County, wrote an opinion reported in 86 N.J. Super 169, 206 A. 2d 206 (1965). The Superior Court of New Jersey, Appellate Division, reversed the judgment of the Law Division; its opinion is reported in 90 N.J. Super 126, 216 A. 2d 408 (1966). The opinion of the New Jersey Supreme Court, which reversed the judgment of the Appellate Division, is reported in 48 N.J. 214 (1966).

(b) The jurisdiction of this Court is invoked to review the final judgment of the Supreme Court of New Jersey, the highest court in the State of New Jersey.

(i) The date of the opinion, judgment and mandate of the New Jersey Supreme Court is November 21, 1966.

(ii) There were no orders or applications respecting a rehearing, nor have there been any orders or applications respecting the granting of an extension of time within which to petition for certiorari.

(iii) Jurisdiction in this Court to review the judgment by writ of certiorari is invoked under section 1257 of Title 28 of the United States Code, and is required to be exercised to protect against a taking of the petitioner's rights of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) The questions herein presented for review are:

(i) Is the doctrine of sovereign municipal immunity from tort liability, of non-redressible injury when done by a state or government official, constitutional?

(ii) May a state, in the name of sovereign immunity, take away a private right of action for damages sustained by being compelled to render obedience to an illegal police regulation?

(iii) Where the sovereign admits to having taken illegal police action resulting in special harm and direct property losses to an individual citizen, is the uncompensated damage *damnum absque injuria* or is the same constitutionally required to be redressible as a taking and damaging "for public use, without just compensation" under the Fifth and Fourteenth Amendments to the Constitution of the United States?

(d) The case involves the following provisions of the Constitution of the United States:

> Amendment V. ". . . [N]or shall any person . . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."
>
> Amendment XIV. ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

(e) Petitioner, owner and operator under lease of a restaurant and tavern, filed this action to recover for the wrongful action of the defendant borough, a municipal corporation of New Jersey, in materially damaging its business by cutting off a route of access thereto. The municipality admitted to having illegally designated the street leading to petitioner's parking lot as a one-way street. No traffic was allowed to make direct entry thereto from a heavily-trafficked roadway, and the municipality's answer to the complaint admitted that the police action in so designating the street as one-way was "arbitrary, capricious, unreasonable and illegal." There was no denial of illegal action, substantial loss to the petitioner proximately caused thereby, and of material, deliberate interference with the petitioner's rights of access and ingress.

The case was heard in the trial Court on a stipulation of facts, but dismissed on a theory that the doctrine of governmental immunity in New Jersey was not such "as to permit a suit for damages." After an Appellate Division reversal, the New Jersey Supreme Court affirmed this dismissal, holding that municipalities were entitled to protection "against endangering financial demands" and that the Borough's conduct was, on a balancing of factors,

"fairly and justly to be viewed as nontortious or as otherwise immune."

There remains for decision whether the rationale employed by the New Jersey courts to deny redress against illegal governmental action is a valid and supportable exercise of state policy measured against federal constitutional guaranties. That is to say, while all rights of property are held subject to the police power, subject to the establishment and implementation of all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community, this is the first decision impliedly announcing that these constitutionally protected rights of property are subject also to illegal and admittedly unreasonable exercises of the state police power.

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158 (1922), this Court held that if a state law were applied to the case, the statute would be "admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far. . . ."

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

So too here, the conduct of the municipality was not merely unreasonable but actually unlawful. None of the policy considerations alluded to by the New Jersey Supreme Court discloses "a public interest sufficient to warrant so extensive a destruction of the [petitioner's] constitutionally protected rights." 43 S. Ct., at page 159.

Whether the doctrine of governmental immunity is ordained by state statutes or legislated by court decision is of no consequence. In either event, generally and particularly as applied to the facts of this case, it represents the

exercise of an arbitrary power by the state, to the injury of the persons and property of citizens of the United States. It is settled that the Fourteenth Amendment expresses a limitation against the actions of "public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Hurtado v. California, 110 U. S. 516, 4 S. Ct. 11, 121 (1884). Suggesting that their actions are immune from suit, even when patently illegal and destructive of a man's business, goes far in making limitless state power over the holding of property. In order not to be a taking within the meaning of the due process clause, it should be held that police acts must be done in the proper and legitimate exercise of governmental power and must be within those limitations on the amount of destruction or impairment of the value of property rights which public authorities have heretofore been permitted to occasion without the necessity of paying compensation therefor.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of New Jersey to the end that the errors aforesaid may be corrected by this Court.

LOUIS EISENSTEIN
WITTMAN, ANZALONE & BERNSTEIN

By: FREDERICK L. BERNSTEIN
Attorneys for Petitioner